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In the

Supreme Court of the United States.

October Term, 1930.

No. 519.

Eastern Equities Corporation,
formerly bearing the corporate name
American Glue Company,
Petitioner,

v.

United States of America,
Respondent.

BRIEF FOR PETITIONER.

ROBERT E. GOODWIN,
HARRIS H. GILMAN,
Counsel for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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OCTOBER TERM, 1930.

No. 519.

EASTERN EQUITIES CORPORATION,
formerly bearing the corporate name
AMERICAN GLUE COMPANY,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

BRIEF FOR PETITIONER.

OPINION OF THE COURT BELOW.

The opinion of the District Court for the District of Massachusetts was rendered June 26, 1930, and is reported in 42 Fed. (2d) 235, under the caption *American Glue Company* v. *United States of America,* and appears at R. 25.

The case is before this Court on writ of certiorari directed to the Circuit Court of Appeals for the First Circuit before hearing in that Court.

Since the entry of the case in this Court, the corporate name of the petitioner has been changed to Eastern Equities Corporation (see Stipulation filed November 29, 1930).

There has been no change in the corporate entity of the petitioner.

JURISDICTION.

On November 24, 1930, this Court granted a writ of certiorari under the provisions of sections 347 and 350 of title 28 of the United States Code.

The judgment sought to be reviewed was entered in the District Court for the District of Massachusetts on September 8, 1930 (R. 12). On September 12, 1930, the petitioner filed its appeal therefrom to the Circuit Court of Appeals for the First Circuit. The appeal was allowed on September 15, 1930 (R. 33), and was duly perfected. Before a hearing was had in the Circuit Court of Appeals, certiorari was granted.

STATEMENT OF THE FACTS.

On or about May 1, 1918, the petitioner, then bearing the corporate name American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, having a usual place of business in Boston, Massachusetts, filed its income and excess-profits tax returns for its calendar year 1917, and paid the income and excess-profits taxes shown by said returns, to wit, $514,311.62 (R. 5, 6).

During September, 1920, the Commissioner of Internal Revenue assessed against the petitioner additional income and excess-profits taxes for the year 1917 in the amount of $173,674.61 (R. 6).

The petitioner paid $2450.80 and filed a claim in abatement of the sum of $171,223.81 on November 15, 1920, with the Collector of Internal Revenue (R. 6).

On November 24, 1925, more than two and a half years after the running of the statute of limitations, *the Collector of Internal Revenue served a warrant for distraint upon the Atlantic National Bank of Boston, and by virtue thereof seized $233,263.89 of the petitioner's money on deposit with said bank, of which the Collector claimed that $171,223.81*

was the tax aforementioned and that $62,040.08 was the interest upon said sum of $171,223.81. The Collector paid the money so seized into the Treasury of the United States (R. 6, 7).

On January 15, 1929, the petitioner, having complied with all requisite conditions precedent, brought a petition against the United States of America in the District Court of the United States for the District of Massachusetts to recover said amount of $233,263.89 (R. 12, 13).

The District Court ruled that the petitioner's right to recover the money illegally seized was taken away by the enactment of section 611 of the Revenue Act of 1928, and entered judgment for the respondent (R. 33).

Schedule of Important Dates.

1917 tax return filed	May	1, 1918
Tax shown by the taxpayer's return ($514,311.62) paid	During	1918
Additional assessment ($173,674.61)	Sept. list	1920
Notice and demand for payment of additional assessment	Nov.	6, 1920
Claim in abatement filed ($171,223.81)	Nov.	15, 1920
Payment of part of additional assessment admitted to be due ($2450.80)	Nov.	16, 1920
Notice and demand for payment of additional tax	April	29, 1921
Five-year period from date of filing tax return expired	April	30, 1923
Notice and demand for additional tax	Oct.	25, 1923
Warrant for distraint dated	Sept.	22, 1925
Property seized under warrant for distraint ($233,263.89)	Nov.	24, 1925
Claim for refund filed ($233,263.89)	Dec.	31, 1925
Claim for refund denied	Oct.	16, 1926
Suit commenced (within five years of payment of tax)	Jan.	15, 1929

SPECIFICATION OF ERRORS.

The following of the assigned errors will be urged, the other errors assigned in the petitioner's bill of exceptions being in amplification thereof:

1. The District Court erred in ruling that the provisions of section 611 of the Revenue Act of 1928 apply to the facts of this case and furnish a complete defense to this suit and defeat the petitioner's right to recover in these proceedings (R. 35).

2. The District Court erred in ruling that section 607 of the Revenue Act of 1928 created no substantive rights which a taxpayer did not already enjoy, except to have his claim recognized by those charged with the administration of the revenue laws (R. 27).

3. The District Court erred in ruling that Congress, by section 611 of the Revenue Act of 1928, undertook to withdraw from the taxpayer the right to reclaim taxes (otherwise rightfully due) which had previously been held recoverable solely on the ground that they had been paid or collected after the statute had run against collection (R. 36).

4. The District Court erred in ruling that the withholding, delaying, and postponement of collection by the Collector in this case, because of the filing of the claim in abatement, was a stay of collection within the meaning of section 611 of the Revenue Act of 1928 (R. 35), and that the word "stayed" as used in section 611 of the Revenue Act of 1928 should be taken as synonymous with "delayed," and that if there was a voluntary or involuntary delay following upon or occasioned by a claim in abatement, the collection was "stayed" (R. 36).

5. The District Court erred in ruling that the petitioner was not entitled to recover interest and penalties not assessed prior to June 2, 1924, which were collected from it in respect to taxes for the year 1917 (R. 34).

6. The District Court erred in ruling that the petitioner is not entitled to recover (R. 33, 34) and in ordering judgment for the respondent (R. 35).

QUESTION PRESENTED.

The question presented is:

Did the enactment of section 611 of the Revenue Act of 1928 take away, in whole or in part, the petitioner's then existing right of action against the United States for the recovery of its property illegally seized and retained by the United States?

[Note: *In this case the Collector of Internal Revenue actually seized, under a warrant of distraint, certain funds of the taxpayer on deposit in a national bank,* whereas counsel for the petitioner understand that in the other cases pending before this Court, involving the meaning and effect of section 611 of the Revenue Act of 1928, the taxes were paid without seizure.]

THE STATUTES INVOLVED.

Revised Statutes, Section 3220 (as Amended).

The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector,

agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section.

[Note: Revised Statutes, sec. 3220, was amended by section 1111 of the Revenue Act of 1926; the amendment inserted at the beginning of the section the words "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926." These words were stricken out by section 619 (*b*) of the Revenue Act of May 29, 1928, c. 852, which inserted in lieu thereof "Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes,". Chapter 901, approved later on the same day, provided that "Section 3220, Revised Statutes as amended, is amended to read as follows," and the section as therein set out omits the exception above mentioned. Accordingly, this exception is omitted in the complete text of the section set forth above.]

REVISED STATUTES, SECTION 3226 (AS AMENDED).

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or pro-

ceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

REVENUE ACT OF 1928.

Title IV—Administrative Provisions.

Section 607. Effect of Expiration of Period of Limitation Against United States.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

REVENUE ACT OF 1928.

Title IV—Administrative Provisions.

Section 611. Collections Stayed by Claim in Abatement.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act)

shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

Note: The following additional statutes and Treasury Regulations referred to in the argument are set forth in the Appendix:

Sections 250 (*b*) and 250 (*d*) of Revenue Act 1921.
Section 1106 (*a*) of Revenue Act 1926.
Sections 321, 322, and 612 of Revenue Act 1928.
Regulation 62, article 1032.

LEGISLATIVE HISTORY OF SECTIONS 607 AND 611.

As first drawn by the House of Representatives (H.R. 1, as reported by Senate Finance Committee, 70th Congress, First Session) section 611 of the Revenue Act of 1928 contained an additional clause, designated (*b*), designed to extend the time within which the Government could go out and collect taxes which had been or were about to become barred by the running of the statute of limitations. This proposed clause (*b*) read as follows:

> "(b) A distraint or proceedings in court for the collection of such part may be begun within one year after the enactment of this Act."

The Senate struck out all of section 611 as framed by the House, including both clause (*a*) and clause (*b*). In joint conference the House insisted upon the retention of section 611 (*a*), but receded as to clause (*b*), and the statute, as finally enacted, contained no provision authorizing the future collection of barred taxes.

SUMMARY OF ARGUMENT.

Upon the illegal seizure of the petitioner's property under the Collector's warrant of distraint, the petitioner had a right of recovery against the respondent, under Revised Statutes, sec. 3226, because the seizure constituted an illegal collection.

Section 611 of the Revenue Act of 1928 did not take away or extinguish the petitioner's right of action. The sole function of section 611 is to limit the scope of section 607 of the same act; and the sole function of section 607 was to create a new type of recoverable "overpayment," namely, a voluntary payment made after the applicable statute of limitations had barred collection. Sections 607 and 611 of the Revenue Act of 1928 apply only to *voluntary* payments and do not apply to involuntary payments or to cases where the taxpayer's property was illegally seized by the Collector under a warrant of distraint. The victim of an illegal collection, brought about by a seizure of his property to satisfy a tax liability which had become barred by the statute of limitations, already had ample protection under the statutes and decisions, and needed no new legislation to protect his rights against the illegal acts of Collectors.

Sections 607 and 611 by their own express terms apply only to cases where taxes are *"paid"* and where *"payments"* are made. Their operation cannot be extended to cases where the taxpayer paid nothing but his property was illegally seized.

Sections 607 and 611, if given the effect urged by the respondent, would effect by implication the partial repeal of section 3226 of the Revised Statutes. There is nothing in the wording of the later legislation to indicate that any partial repeal was intended, and this result should not be brought about by implication.

Neither do sections 607 and 611 retroactively ratify the illegal collection of which the petitioner was the victim,

nor do these sections withdraw the respondent's consent to be sued therefor. The sections of the statute under discussion are not sufficiently explicit to enable them to perform the function of a retroactive ratification or of the withdrawal of an existing consent on the part of the Government to be sued.

The collection of the tax in the case at bar was never "stayed" in the sense in which the term is used in section 611, and therefore the petitioner's case is not affected by the enactment of that section. The word "stayed" used in this section means an active intervention which prevented collection. Congress did not intend that the word "stayed" should be construed as including the voluntary inaction of the Collector.

The "stay" of collection is not by the terms of section 611 made dependent in any way upon the filing of a claim in abatement, nor could a stay be legally caused by the filing of such a claim.

To adopt the construction of sections 607 and 611 urged by the respondent involves the violation of fundamental rules of statutory construction. Words must be added to both sections of the statute, and words which appear in section 611 must be ignored. The respondent appears to urge such a construction, in spite of the fact that we are dealing with tax statutes which should be construed liberally in favor of the taxpayer.

Those Courts which have decided in favor of the respondent have in each instance based their decisions more upon what was said in the reports and debates of Congress than upon the wording of the sections in question. The petitioner contends that there is no such obscurity or ambiguity in these two sections (sections 607 and 611) as to warrant a reference to the Congressional Record, and that in any event the Congressional debates and reports cannot be taken as giving to a statute a meaning not fairly within its words.

To construe section 611 as urged by the respondent is to render it unconstitutional, as being in violation of the Fifth Amendment of the Constitution.

The sum of $62,040.08 of the petitioner's money taken by the Collector (as interest) in excess of the amount of the balance of the tax as assessed which remained unpaid ($171,223.81) was not assessed prior to June 2, 1924, or at any other time, and was not the subject of a claim in abatement. This amount, therefore, cannot fall within the restriction imposed by section 611 of the Act of 1928, regardless of how that section may be construed as to amounts actually assessed before June 2, 1924, and with respect to which a claim in abatement was filed.

The decree of the District Court should be reversed and judgment should be ordered for the petitioner.

ARGUMENT.

Point A.

UPON THE ILLEGAL SEIZURE OF THE PETITIONER'S PROPERTY UNDER THE COLLECTOR'S WARRANT OF DISTRAINT, THE PETITIONER HAD A RIGHT OF RECOVERY AGAINST THE RESPONDENT, UNDER REVISED STATUTES, SECTION 3226.

This right of action was predicated upon the fact that the seizure by distraint constituted "*an illegal collection,*" because made after the expiration of the five-year period for collection prescribed by section 250 (*d*) of the Revenue Act of 1921.

Bowers v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (71 L. Ed. 676).

This proposition is not disputed by the respondent (see opinion of the Court below, R. 26).

The proposition is stated here for the purpose of bringing into bold relief the fact that the petitioner is entitled to recover in this case, unless the respondent can sustain its contention that subsequent legislation (section 611 of the Revenue Act of 1928) took away this right of action.

Point B.

SECTION 611 OF THE REVENUE ACT OF 1928 DID NOT TAKE AWAY OR EXTINGUISH THE PETITIONER'S RIGHT OF ACTION.

I.

Section 611 performs no function in the legislative scheme other than to limit the scope of section 607 of the same act.

For convenience the text of section 611 is re-printed here, and the portions thereof which the petitioner wishes to emphasize are set out in bold type.

> "Sec. 611. **Collections, Stayed by Claim in Abatement.** If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, **then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.**"

It is patent that the only effect of this section is to limit the operation of the provisions of section 607. It provides that if the three conditions specified attach to a payment, such payment shall not be considered or classified as an

"overpayment" of the kind dealt with in section 607. Therefore, to understand the effect and meaning of section 611 we must turn to section 607.

II.

The sole function of section 607 was to create a new type of recoverable "overpayment."

For convenience section 607 is re-printed in full and the portions thereof which the petitioner wishes to emphasize are set out in bold type.

> "Sec. 607. **Effect of Expiration of Period of Limitation against United States.** Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or **paid** (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto **shall be considered an overpayment** and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

The learned judge of the District Court ruled that—

> "Section 607 created no substantive rights which the taxpayer did not already enjoy except to have his claim recognized by those charged with the administration of the revenue laws" (R. 27).

It is submitted that this was error.

The petitioner contends that section 607 created a new type of recoverable *"overpayment."* It brought within the statutory definition of the word *"overpayment,"* a payment made *"after the expiration of the period of limitation properly applicable thereto."*

Before the enactment of this section *"overpayments,"* as defined by the Revenue Acts, had been limited to payments

in an amount which "*exceeds the amount determined to be the correct amount of the tax*" (Revenue Act of 1924, sec. 272; Revenue Act of 1926, sec. 272; Revenue Act of 1928, sec. 321). Each of these sections makes specific cross-reference to that other section of the same act which deals with the administrative handling of "overpayments" (Act of 1924, sec. 281; Act of 1926, sec. 284; Act of 1928, sec. 322).

Hence, prior to the enactment of section 607, a taxpayer who had voluntarily paid a barred tax was not entitled to have the amount so paid credited or refunded under any of the provisions of these statutes, except to such extent as the payment "*exceeds the amount determined to be the correct amount.*" Presumably the payment would be in the amount determined to be the correct amount of the tax.

Furthermore, prior to the enactment of section 607 of the Revenue Act of 1928, such a voluntary payment could not be credited or refunded under the provisions of section 3220 of Revised Statutes, except to such extent as it might constitute a payment "excessive in amount," and for the same reason it would not be recoverable by suit under section 3226 of the Revised Statutes. Obviously, the acceptance of such a voluntary payment by the Collector would not constitute an "erroneous," "wrongful," or "illegal collection," so as to enable the taxpayer to take advantage of those provisions of Revised Statutes, secs. 3220, 3226, covering such collections, because a taxpayer who voluntarily made payment, after collection had been barred by the expiration of the applicable statute of limitations, would be in the same position as one who had paid a barred debt to a private debtor. His voluntary payment would constitute an acknowledgment of the debt.

Gross v. *Allen*, 141 U.S. 528 (35 L. Ed. 843).
In re Salmon, 249 Fed. 300.
Gillingham v. *Brown*, 178 Mass. 417.

The respondent appears to admit that section 607 gives to a voluntary payment, made after the expiration of the period of limitation, the status of a recoverable overpayment. Such is the Treasury Department's interpretation of the section as set forth in Mim. 3660, Cumulative Bulletin VII-2, pp. 82, 83, 84. The pertinent part of this ruling reads as follows:

"Effect of Section 607.

"(1) Section 607 provides that regardless of the correct tax liability any amount paid shall be considered an overpayment if the assessment of such amount was made after the expiration of the period of limitation on assessment, or if the payment was made after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period)."

This mimeograph letter also appears to recognize the fact that, prior to the enactment of section 607, a voluntary payment, made after the statute of limitations had barred collection, did *not* constitute an "*overpayment,*" and hence could not be credited, refunded, or recovered by suit.

It would appear, therefore, that the respondent will admit the petitioner's contention that section 607 did create a new kind of statutory "overpayment."

The object of the enactment of section 607 may well have been to relieve the voluntary payor from the consequences of his ignorance of his rights and to put him on a parity with those who resisted the demands of the Collectors to the point of creating a duress or until an illegal seizure resulted. Or its object may have been to expedite the prompt settlement of the large number of pending tax disputes (resulting from the Treasury Department's misinterpretation of the law relating to distraint) by doing away with the necessity

of establishing in each case (where there was a *payment* as distinguished from a *seizure*) that the *payment* had actually been made under such a degree of governmental pressure or threat as to constitute duress and so render the collection a wrongful or illegal collection and as such refundable or recoverable under Revised Statutes, secs. 3220 and 3226.

The divergence between the petitioner and respondent appears to come upon the point whether this section also covered the field of *involuntary payments*, so as to make it (and its complement, sec. 611) applicable to "*wrongful and illegal collections.*" Unless the respondent can establish that these sections did have the broader application, they do not affect the petitioner's rights in any way and the respondent's defense must fail.

III.

Sections 607 and 611 apply only to voluntary payments and not to involuntary payments or illegal collections.

Section 607 became effective on May 29, 1928. By its express terms it deals only with *payments, i.e.*, "Any tax . . . paid after the expiration of the period of limitation properly applicable thereto. . . ."

Previous to the enactment of section 607 the victim of a "*wrongful*" or "*illegal collection*" had a full and complete remedy for the recovery of his money, including the right to have it credited or refunded by the executive department of the Government under Revised Statutes, sec. 3220, or, that remedy failing, to sue for the recovery thereof under Revised Statutes, sec. 3226. This right in the taxpayer has been definitely established by this Court.

Graham v. *Dupont*, 262 U.S. 234 (67 L. Ed. 965).
Bowers v. *New York & Albany Lighterage Co.*, *supra* (decided February 21, 1927).

In the latter case above cited (and both cases decided with it) the illegal collections appear to have been made by seizure of the taxpayer's property under a warrant of distraint (just as in the case at bar). However, for the purpose of presenting the point now under discussion, it will be assumed that a collection under threat of seizure or other duress would constitute a "wrongful" or "illegal collection" and as such be recoverable by suit under Revised Statutes, sec. 3226.

Therefore there was no need for any new legislation to establish or confirm the right of recovery on the part of a taxpayer who, after the expiration of the limitation period, made an involuntary payment under duress or who became the victim of an illegal seizure. Revised Statutes, secs. 3220 and 3226, already afforded full protection in such cases and had done so ever since the enactment of the Revenue Act of 1918, which first prescribed a period of limitation with respect to the collection of Internal Revenue taxes (Revenue Act of 1918, sec. 250 (*d*)).

The new sections appearing in the Act of 1928 (607 and 611) did not duplicate this existing remedy. It will be demonstrated that they have no such function.

They Cannot Apply to Involuntary Payments or Seizures Made After Their Enactment.

Both sections expressly apply to payments made before as well as after the act became effective. So far as they purport to affect payments made *after* their enactment, they must, of necessity, have been intended to refer only to voluntary payments. Any other construction would, in practical effect, countenance a continuance of the practice of making illegal collections of barred taxes. It may be assumed that the respondent will not contend that, should a Collector proceed to distrain for the collection of a barred tax *after* the enactment of these sections, the victim of such

an illegal collection would have no remedy if he had filed a claim in abatement and collection had been stayed within the meaning of section 611. If such a contention should be put forth by the respondent, a complete answer to it is found in the fact that the clause in the original revenue bill (designated section 611 (*b*)), designed to extend for one year the Government's right to enforce collection of barred taxes, was stricken out and did not appear in the final legislation (see H.R. 1, 70th Congress, 1st Session). Moreover, the Treasury Department has officially adopted this interpretation of the statute in Cumulative Bulletin VII-2, pp. 82-85, wherein it points out to Collectors that the Government has completely lost its right to enforce outlawed tax claims, regardless of whether a claim in abatement had or had not been filed. This Treasury ruling provides in C.B. VII-2, p. 82, at 83:

> "Sections 607 and 611 do not authorize the Bureau *to enforce collection* of a tax *in any case* after the expiration of the period of limitation, but merely prescribe the effect of the period of limitations against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto." (Italics ours.)

It is wholly illogical to attribute to Congress the intention to expressly provide a remedy under section 607 for the recovery of a kind of illegal collection which it must have presumed would not thereafter occur, and this particularly when existing law already provided ample protection to any person who might be the victim of such an illegal collection or exaction.

If, then, these sections are not to be construed as applicable to *involuntary* payments or *illegal collections* made *after* their enactment, there would seem to be no logical basis for the contention that they apply to *involuntary pay-*

ments or *illegal collections* made *prior* thereto. There are no words in either of these sections which suggest that any such differentiation is intended.

If the respondent would claim that the provisions of section 607 apply to voluntary payments, involuntary payments, and collections made by distraint and seizure, then it must admit that, in so far as it applies to involuntary payments (brought about by duress) or to collections by distraint, or to any collections which would fall within the classification of "wrongful or illegal collections" (Rev. Stat. sec. 3220), it is merely duplicating the provisions of Revised Statutes, sec. 3220, although not in terms affording the complete remedy by suit given by Revised Statutes, sec. 3226.

The only excuse for attempting to give section 607 this broader application is to permit the Government to spring the trap of section 611 on all suitors or applicants for refund who may have filed claims in abatement at some stage of the proceedings before the Treasury Department.

Significance of Term "Overpayment."

The petitioner's contentions as to the proper scope of these sections finds support in the wording of section 607 itself, from which it is apparent that its function was primarily that of definition. In effect, section 607 says that every payment of a certain kind "*shall be considered as an overpayment.*" This definition is coupled with the administrative direction that such an overpayment shall be credited or refunded to the taxpayer if proper claim for refund is filed. The general subject of "overpayments," and the crediting and refunding thereof, is dealt with in the Revenue Act of 1928 in "Supplement O—Overpayments," which supplement contains section 321, which gives the general definition of "*overpayments,*" and section 322, which makes full provision for the administration of them.

To understand the scope and purport of these sections dealing with the subject of "overpayment," one must trace their development through the earlier enactments. This involves a study of the following sections:

Revenue Act of 1918, secs. 250 (*b*) and 252.
Revenue Act of 1921, secs. 250 (*b*) and 252.
Revenue Act of 1924, secs. 271, 272, 281.
Revenue Act of 1926, secs. 271, 272, 284.
Revenue Act of 1928, secs. 321, 322, 607, 611.

The headings of these several sections are enlightening, as well as the "*Titles*" or major sub-divisions under which they appear.

The kernel of the definition of an "overpayment" appears in Act of 1918, sec. 250 (*b*). It is the section which directs the Commissioner to examine all returns and to credit or refund "the excess" as provided in section 252 of the same act.

Section 252 provides:

> "That if, upon examination of any return of income . . . it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer."

Both of these sections in the 1918 statute appear in "Part IV, Administrative Provisions."

Clearly these sections are designed to govern the keeping of the Government's accounts with the taxpayers. They are purely administrative. They deal with credits and refunds

of excess *payments* over and above the amount which ought to have been paid after the taxpayer's return has been examined and revised or corrected. They appear along with correlative provisions relating to deficiencies appearing upon an examination of the return. They deal wholly with the administrative machinery of adjusting the ledger accounts with the Government's customers—the taxpayers.

In the subsequent Revenue Acts referred to above, these administrative provisions are developed and refined. In 1924 we find the definition of "overpayments" appearing in a separate section (272), and the administrative machinery for dealing with them is further sub-divided and formalized in section 281. The process of refinement, formalization, and sub-division continues through the Acts of 1926 and 1928, but always the sections connote the single thought of dealing with the crediting and refunding of amounts which appear *from the returns* as being in excess of what should have been assessed and charged against the taxpayer. They all have to do with bookkeeping and adjustment of current accounts consequent upon the examination and revision of the taxpayer's return. They do not purport to cover the field of claims or suits based upon illegal seizures or collections. This fact is clearly brought out in the provisions of section 284 (*d*) of the Act of 1926 and section 322 (*c*) of the Act of 1928, which expressly reserve to taxpayers the right to sue in the Courts for "any amount *collected* after the period of limitation . . . has expired," even though the adjustment of the taxpayer's account with the Government is pending before the Board of Tax Appeals. If such a *collection* had been regarded as an "overpayment," this provision would have no logical basis to support it.

It is submitted, therefore, that section 607 is supplemental to those other sections which deal with *"overpayments."* As such it must be read as an adjunct to section 321 of the Act of 1928, and construed in the light of the historical development of this section. This being so, section 611 must

be read as a part of section 607, the same as if its provisions had been adjoined to it by some such phrase as "provided however." So read and construed these sections (607 and 611) can have reference only to voluntary payments and cannot refer to illegal collections, whether made by seizure or otherwise.

IV.

Even if sections 607 and 611 might be held to apply to PAYMENTS made under duress, they cannot apply to a case wherein there was a SEIZURE by the Collector, but no PAYMENT by the taxpayer.

In the case at bar the petitioner made no payment. Its property was seized and the money turned into the Treasury of the United States (R. 6, 7). In this respect the petitioner's case differs from other cases which have come before the Courts involving these sections. The difference may well be of vital importance.

It is significant that both sections 607 and 611 employ only the words "paid" and "payment" in referring to what transpired between the taxpayer and the Government. But the petitioner never made any *payment* or *paid* any money. Its bank account was seized by the Collector under a warrant of distraint (R. 6, 7). The distinction here made is not fanciful.

Throughout the Revenue Acts a differentiation is made between the "payment" of a tax and the "collection" of a tax. The differentiation appears with especial clearness in section 322 (*c*) of the Act of 1928, wherein a taxpayer's right to sue for—

(1) Overpayments, or
(2) Excessive collections, or
(3) Amounts collected after the limitation period has expired—

are listed and dealt with in separate numbered clauses, showing that each was a different kind of right (see also section 284 of the Act of 1926).

There is special significance in the fact that in the section *next preceding section 607* (namely, section 606 of the Revenue Act of 1928) both *"collection"* and *"payment"* are enumerated, one after the other in the same clause, thus indicating that in the legislative mind they are not the same thing and that as ordinarily used neither one includes the other. On the other hand, section 609 of the same act used the word *"payment"* when referring to the making of an *"overpayment."*

The same distinction appears in many other sections, including the following: Revenue Act of 1928, secs. 11, 12, 101 (*a*), 101 (*d*), 201 (*b*), 204 (*a*), 272 (*a*), 272 (*b*), 291, 321, and 606.

Compare also the following sections of the Act of 1928, wherein the words *"paid"* and *"payment"* are used with exactitude to express the idea of voluntary payments: secs. 132, 322 (*b*) (1), 322 (*b*) (2), 613 (*e*).

There is some internal evidence within section 611 itself to show that Congress was conscious of this distinction. It uses the word "collection" to connote the action of the Collector in the exercise of the powers of his office. On the basis of respondent's theory of construction, Congress might just as well have said "and if the *payment* of any part thereof was stayed." Instead, the language used was "and if the *collection* of any part thereof was stayed."

Furthermore, when section 611 refers directly to section 607 to describe or define the scope of the earlier section, the following significant language is used:

> ". . . relating to *payments* made after the expiration of the period of limitation on assessment and collection." (Italics ours.)

This distinction is in accord with the construction which has been put upon these words by the Courts and with the accepted definitions thereof.

The verb "to pay" is transitive. It may be used in either the active or passive sense, but, however used, it connotes an act by a person who may be called the "payor."

Bronson v. *Rodes,* 74 U.S. 229 (19 L. Ed. 141).
Luckenbach v. *McCahan Co.,* 248 U.S. 139 (63 L. Ed. 170).
Hathaway v. *Davis,* 33 Cal. 161.
Bloodworth v. *Jacobs,* 2 La. Ann. 24.
Jenkins v. *Mapes,* 53 Ohio St. 110.
Robinson v. *Doolittle,* 12 Vt. 246.
Thompson v. *Kellogg,* 23 Mo. 281.
Beals v. *Ins. Co.,* 36 N.Y. 522.
Detroit &c. R.R. Co. v. *Smith,* 50 Mich. 112.
Fisher v. *City of Seattle,* 55 Wash. 396.
Sokoloff v. *National City Bank,* 224 N.Y. Supp. 102.
Kingston Bank v. *Gay,* 19 Barb. (N.Y.) 459.

The definition of "payment" set forth by the Court in the last case above cited has been repeatedly quoted and cited with approval in other jurisdictions.

The Court said (at p. 460):

> "To constitute a payment, money or some other valuable thing must be delivered by the debtor for the purpose of extinguishing the debt, . . ."

On the other hand, the word "collect" means to obtain payment either by voluntary act of the debtor or by the use of force or process by the creditor.

Black's Law Dictionary:

> "To collect a debt or claim is to obtain payment or

liquidation of it either by personal solicitation or legal proceedings."

See—

Ryan v. *Tudor*, 31 Kans. 366.
Purdy v. *The City of Independence*, 75 Iowa, 356.
Hubbell v. *Board of Commissioners*, 13 N. Mex. 546 (86 Pac. 430).
Taylor v. *Kearney Co.*, 35 Neb. 381 (53 N.W. 211).

It would seem that had Congress intended to include cases of collection by seizure within the meaning of sections 607 and 611, it would have inserted after the word "*paid*" the words "*or collected,*" and likewise in section 611 it would have inserted after the word "*payment*" the additional words "*or collection.*" Or had Congress, for sake of conciseness, wished to cover both voluntary or involuntary payments, it would seem that the words "*collected*" and "*collection*" would have been adopted as being the single words which properly could connote both.

The above considerations are supported by the provisions of section 322 of the Act of 1928. This section was designed to give the Board of Tax Appeals full and final jurisdiction to determine the true and exact or net amount of a tax payable with respect to any one year, in cases where the Government claimed a deficiency and the taxpayer claimed an overpayment; but it expressly preserved to the taxpayer his right to sue for the recovery of a tax *collected* after its *collection* had become barred by the running of the statute of limitations, even though proceedings might be pending before the Board of Tax Appeals respecting alleged deficiencies or overpayments. If, as the respondent contends, a collection by distraint after the statute has expired constitutes an "overpayment," under section 607, it was neither necessary nor logical to expressly reserve to the taxpayer,

by section 322 of the same act, a right to sue for a tax *collected* after the statute had run, even though he was still before the Board of Tax Appeals respecting the net amount of his tax liability. The provisions of section 322 of the Act of 1928 bring out the differentiation between (1) *"overpayments,"* (2) *"excessive collections,"* and (3) *"collections" made after the statute of limitations had expired.* The latter are dealt with as being in a class by themselves and as something wholly different from an ordinary *"overpayment"* or *"excessive collection."*

Indeed, if the words *"overpayment"* or *"overpaid,"* as used in the Revenue Acts, had included illegal seizures and collections, the plaintiffs in the group of cases cited as—

Bowers v. *New York & Albany Lighterage Co., supra*—

could not have recovered, because, not having *"overpaid"* their taxes, they would have been within the prohibitive clause of section 1106 (*a*) of the Revenue Act of 1926, which was in force when those cases were decided by this Court, in February, 1927.

It is submitted that these considerations all tend to show that, when employing the terms *"overpaid"* and *"overpayment,"* Congress did not intend to touch upon the field of illegal collections.

Further support is given to this suggestion when it is considered that, if the term *"overpaid,"* as used in section 1106 (*a*) of the Act of 1926, were construed to cover cases of illegal collections, the practical effect of the section would have been to allow, countenance, and ratify illegal collections and seizures made after collection had become barred by the statute of limitations. Of course such a construction is impossible.

Ellay Co. v. *Bowers*, 25 Fed. (2d) 637; certiorari denied, 277 U.S. 606 (72 L. Ed. 1012).

It must be presumed, therefore, that in phrasing sections 607 and 611 of the Act of 1928, Congress likewise intended that the term *"overpayment"* should be applicable in the same general field as formerly, thus excluding the field of illegal collections.

If the respondent's contention as to the broad application of sections 607 and 611 is correct, it is difficult to see where these sections fit in the general legislative scheme. Section 607 alone purports to grant any relief or confer any rights or privileges, but it does not, of itself, offer a complete remedy to a taxpayer who comes within its terms. Its function is primarily that of definition. It provides that payments of certain types *"shall be considered as overpayments."* But to determine what one's rights might be by virtue of having made an "overpayment," it would be necessary to look to other sections of the Revenue Act of 1928 and to sections of the Revised Statutes. Section 322 of 1928 deals with credits and refunds of overpayments, and Revised Statutes, sec. 3220, deals with refunds of *"excessive collections"*; and Revised Statutes, sec. 3226, deals with rights of action where relief before the executive departments of the Government has failed. To be sure, section 607 goes on with a direction of a purely administrative character to the effect that such "overpayments" shall be credited or refunded, provided a proper claim for refund is filed. But, as stated above, the machinery at the disposal of the taxpayer to obtain such a credit or refund must be sought in other provisions of the tax laws.

Therefore the primary function of section 607 was to define the new type of "overpayment" created by it, with the result that any "overpayment" thereby created would be administered according to the complete and elaborate provisions of statute made with respect to the crediting, refunding, or recovery by suit of all payments which fall within the general classification of "overpayments." Illegal seizures never fell within this classification.

V.

No implied repeal of Revised Statutes, sec. 3226.

The interprepation put upon sections 607 and 611 by the Court below has the effect of repealing by implication so much of Revised Statutes, sec. 3226, as gave a right of action to one whose property had been seized to satisfy a barred tax liability, but who had filed a claim in abatement respecting such tax and procured a stay of collection.

It is submitted that there is nothing in the wording of either of these sections which indicates an expressed intention to bring about such a partial repeal.

Such a result must be reached by implication, if at all. A construction which has such a result, therefore, should be avoided, since it is settled law that repeals by implication are not favored.

United States v. *Heth*, 3 Cranch, 399 (2 L. Ed. 479).

White v. *United States*, 191 U.S. 545 (48 L. Ed. 295).

Schwab v. *Doyle*, 258 U.S. 529 (66 L. Ed. 747).

United States v. *Magnolia Petroleum Co.*, 276 U.S. 160 (72 L. Ed. 509).

Russell et al. v. *United States*, 278 U.S. 181 (73 L. Ed. 255).

Bookbinder v. *United States*, 287 Fed. 790.

Stevens v. *Biddle*, 298 Fed. 209.

In this last case the Court said, at page 212:

> ". . . It is a well-settled canon of construction that repeals by implication are not favored, and will not be held to exist, if there is any other reasonable construction; and if a former act can be harmonized with a later one, it is the duty of the court to enforce it."

See also—

Washington v. *Miller*, 235 U.S. 422, 428 (59 L. Ed. 295, 299).

In this case the Court said:

> ". . . such repeals [by implication] are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both."

There is no irreconcilable conflict between the statutes here under construction.

VI.

Section 611 does not retroactively ratify illegal collections or withdraw the Government's consent to be sued.

Since the petitioner had a right of action under existing law when sections 607 and 611 of the Act of 1928 were enacted, the respondent's contention as to their meaning and effect compels a ruling that they either—

(*a*) retroactively ratify the illegal acts of the Collectors of Internal Revenue; or

(*b*) constitute a withdrawal of the Government's consent to be sued for the recovery of past illegal collections.

It is submitted that neither of these propositions can be maintained.

(*a*) *No Retroactive Ratification.*

Section 611 is not a ratification statute. Even had Congress intended by it to ratify past illegal collections, the language used is not sufficiently explicit to accomplish this

result. To hold otherwise would ignore the well-settled rule of law that a statute which attempts to ratify an illegal act of a Government official must specify with explicitness the acts to be ratified.

Lincoln v. *United States*, 202 U.S. 484 (50 L. Ed. 1117).

McLeod v. *United States*, 229 U.S. 416 (57 L. Ed. 1260).

In the following cases, on which the respondent has relied for the proposition that Congress may ratify an illegal act of a Government official in collecting a tax or customs duty, it clearly appears that the statute which attempted such ratification was most explicit and definite in its terms, and therefore such cases are in reality authority for the petitioners' contentions.

United States v. *Heinszen*, 206 U.S. 370 (51 L. Ed. 1098).

Rafferty v. *Smith, Bell & Co.*, 257 U.S. 226 (66 L. Ed. 208).

Moreover, it appears from the above cases that the requirements for a valid ratifying statute are so strict that Congress passed several statutes before it suceeded in passing one which was sufficiently explicit to cover most of the illegal acts which it desired to ratify.

Even after the last of this series of ratification statutes, the Supreme Court refused to apply the retroactive ratification to the illegal acts of Collectors which were not within the strict meaning of the ratifying act.

McLeod v. *United States, supra.*

It should be observed also that the authority of the cases of *United States* v. *Heinszen* (*supra*) and *Rafferty* v. *Smith,*

Bell & Co. (*supra*), has been greatly weakened, if not entirely destroyed, by a subsequent decision of this Court.

Forbes Pioneer Boat Line Co. v. *Commissioners*, 258 U.S. 358 (66 L. Ed. 647).

(*b*) *No Withdrawal of the Government's Consent to be Sued.*

The requirement that a statute which attempts to ratify an illegal act of a Government official must specify with explicitness the acts to be ratified, equally applies to statutes by which it is intended that the Government withdraw its consent to be sued with respect to illegal acts of its servants or agents. Withdrawal of consent to be sued is merely the effect of the ratification of an illegal act. The cases set forth in the foregoing subdivision of the brief also support this proposition.

Point C.

THE COLLECTION OF THE TAX IN THE INSTANT CASE WAS NOT "STAYED."

Even if we assume that the petitioner's right to sue for an illegal collection was affected by section 611, nevertheless, to make the statute applicable to the case at bar, the respondent must establish that the collection of the tax was "stayed" within the meaning of the section.

The respondent admits that there was no legal "stay" in this case which prevented the Collector from making collections at any time (R. 16).

The petitioner contends that the verb "*to stay*" as used in section 611 means a legal stay. The respondent contends, and the District Court ruled, that "stayed" means no more than "delayed."

I.

The word "stayed" refers to a legal "stay."

As specifically applied to legal proceedings the verb "to stay," in its *transitive* sense, is thus defined in Webster's New International Dictionary, 1922:

> "To stop, or more usually suspend, the progress of by judicial proceedings or executive mandate."

The same dictionary defines the word in its more general application:

> "To hold from proceedings; to stop; to check; restrain; also, to hinder; delay, detain; postpone; keep back."

See also the following dictionary definitions:

Black's Law Dictionary:

> "*Stay*—A stopping; the act of arresting a judicial proceeding by the order of a Court."
>
> "*Stay of Proceedings*—Suspension by order of the Court."
>
> "*Stay of Execution*—The stopping or arresting of execution, on the judgment, that is of the creditors' right to issue execution. This is given by statute . . . or it may take place by agreement of the parties."

See also—

Words and Phrases, 3d Series:

> "Stay and injunction being often loosely used and treated as synonymous."

Words and Phrases, 1st Series:

> "*Stay*—In its general meaning to stay is to forbear

to act or to stop, but in its technical sense applies to proceedings already commenced, and as used in an *injunctional order, directing* 'that all suits and proceedings to collect a debt set forth *be* and the same *are* hereby stayed' applies not to past proceedings alone, but future ones also."

See also—

Wharton's Law Lexicon:

"Staying Proceedings:—By the Judicature Act 1875, Section 24(5), the courts have power to stay proceedings in cases where an injunction or prohibition could formerly have been obtained."

See also—

Cyclopedia Law Dictionary:

"Stay of proceeding—A suspension of proceedings in a cause either by an order of the Court or by some proceeding such as an appeal which operates ipso facto as a suspension."

See also—

Byrne's Law Dictionary:

"*Stay*—A stay of proceedings in an action is suspension of them; thus, if a plaintiff is ordered to do something and fails to do it, the proceeding may under the inherent jurisdiction of the court be ordered to be stayed until he complies with the order."

Thus it is apparent that "to stay" ordinarily connotes an intervention which has the effect of *preventing* action. The petitioner contends that "*stayed,*" as used in section 611, carries this connotation and refers to an intervention which *required* or *compelled* the Collector to desist from proceeding to collect.

II.

Section 611 does not make the "stay" dependent upon the filing or pendency of a claim in abatement.

The respondent attempts to inject into section 611 a causal relationship between the filing of the claim in abatement and the Collector's inaction. Section 611 itself contains no words which indicate the presence of any such causal relation. It reads, "if a claim in abatement was filed, with or without bond, *and* if the collection or any part thereof was stayed."

The respondent in support of its contention will undoubtedly point to the heading of section 611, which reads "Collections Stayed by Claim in Abatement." But such headings are merely aids in subdividing the text of the statute. Moreover, the word "and" as used in section 611 in the phrase "and collection of any part thereof was stayed" indicates a conjunctive rather than a causal relation between the filing of the claim in abatement and the "stay." Accordingly, the established rule should be applied that where the heading or caption of a statute is in conflict with the text, the latter prevails. This rule was applied to the construction of section 611 in—

Sugarland Industries v. *Bass* (D.C. W.D. Tex. Nov. 1929), 36 Fed. (2d) 375.

Furthermore, the Treasury regulations in effect for several years before the expiration of the period of limitation in the case at bar expressly ruled that the filing of a claim in abatement did *not* stay the collection of a tax.

Regulation 62, art. 1032.

If the "delay" must be caused by the filing of the claim in abatement, then in each case the administrative officials of the Treasury Department or the Courts must

determine as a fact what was in the mind of the Collector concerned during the period of limitation, and the rights of the taxpayer will depend upon whether the delay was due to the filing of the claim, or to oversight, carelessness, or a misunderstanding of the law governing the Government's rights to enforce collection. This seems to lead to an absurd result.

It is submitted that it is unsound to give to these words a construction which would require a determination of the mental processes or state of mind of a Collector of Internal Revenue or his numerous subordinates and to make the substantive rights of a taxpayer depend thereon. This is the more obvious when it is considered that all questions of allowances of claims in abatement are determined in the office of the Commissioner of Internal Revenue in Washington, whereas the question of the time when collection shall be made is determined by the local Collectors in the several districts. Furthermore, a Collector will naturally attribute the delay to the filing of the abatement claim, since to admit that his delay arose from neglect or mistake of law might render him personally liable on his bond, because of failure to collect without proper cause.

These facts show the impracticability of proving, as a vital and pivotal fact, this causal connection between the pendency of the claim in abatement and the enforcement of collection.

It is anticipated that the respondent will next take the point that unless "stay" is construed to mean "delay," the clause *"with or without bond"* has no meaning. It is submitted that there is no merit in this contention, because a stay of collection could be brought about by an agreement between the taxpayer and the Commissioner with or without bond (see Revenue Act of 1921, sec. 250 (*d*)); or by filing a bond (Revenue Act of 1924, sec. 279 (*a*)). And also it must be assumed that Congress had knowledge of the fact that in many cases in the past injunctions against collection

had actually been issued, notwithstanding the provisions of Revised Statutes, sec. 3224.

See, for example—

Hill v. *Wallace*, 259 U.S. 44 (66 L. Ed. 822).
Graham v. *Dupont*, 283 Fed. 300; reversed, 262 U.S. 234 (67 L. Ed. 965).
Lipke v. *Lederer*, (1922) 259 U.S. 557 (66 L. Ed. 1061).
Ledbetter v. *Bailey*, (1921) 274 Fed. 375.
Fontenot v. *Accardo*, (1922) 278 Fed. 871.
Middleton v. *Mee*, (1921) 277 Fed. 492.
Polk v. *Page*, (1921) 276 Fed. 128; reversed by C.C.A. 281 Fed. 74.

Also it is clear that the clause "*with or without bond*" qualifies or refers only to the claim in abatement and not to the stay of collection. But, as shown above, there might be a stay, *i.e.*, an enforced suspension of activity, without a bond. It might be done by stipulation or agreement and had been done by order of Court.

III.

To construe "stayed" as meaning "delayed," without reference to the claim in abatement, gives no real effect to the words "and collection was stayed."

On the other hand, if the respondent abandons a construction which necessarily involves the causal relationship between the claim in abatement and the delay, but insists upon construing the word "*stayed*" as meaning "*delayed by voluntary action of the Collector,*" then the clause in the section reading, "*and if the collection of any part thereof was stayed*" has no effective meaning, because, if the five-year statute of limitations had expired in any particular case without action by the Collector, there must necessarily

and inherently have been delay. A construction of section 611 which renders as mere surplusage the clause reading, *"and if the collection of any part thereof was stayed,"* violates the fundamental rule of construction that every word in a statute must, if possible, be given an effective meaning.

United States v. *Ninety Nine Diamonds*, 139 Fed. 961; certiorari denied, 201 U.S. 645 (50 L. Ed. 903).

Dwight & Lloyd Sintering Co., Inc., v. *American Ore Reclamation Co.*, 263 Fed. 315; certiorari denied, 252 U.S. 582 (64 L. Ed. 727).

United States v. *Daniels*, 279 Fed. 844.

Pillsbury Flour Mills Co. v. *Great Northern Ry.*, 25 Fed. (2d) 66.

VanDuren Harrington Co. v. *Northern Pacific Ry.*, 32 Fed. (2d) 466.

The dilemma in which the respondent finds itself in its efforts to distort the plain meaning of the words of section 611, as above pointed out, arises because it attempts to read into the statute words and connotations which are not there. The statute connects the clause referring to the filing of a claim in abatement with the clause relating to a stay of proceedings, by the simple conjunction *"and."* It says nothing about the *pendency* of a claim in abatement, but refers only to the *filing* thereof. If read just as it is written, its meaning is plain and logical. It provides that, if a taxpayer files a claim in abatement and also procures a stay of collection, so that the hands of the Collector are tied, and if then the statute of limitations expires, the taxpayer finds his rights under section 607 limited by the provisions of section 611. This is a sane and common-sense provision. It merely says that a taxpayer, who has tied the hands of the Collector until the statute of limitations expired, should not be allowed to take advantage of the new and liberal provisions of section 607.

But even if section 611 is stretched and distorted sufficiently to permit the construction contended for by the respondent, all that it finally accomplishes is to enlarge the class of taxpayers who are deprived of the new benefits conferred by section 607; and, since the rights of the petitioner never depended on section 607 and were not affected by its enactment, its rights are not affected by any distortion in the construction of section 611.

Point D.

THE INTERPRETATION PUT UPON SECTIONS 607 AND 611 BY THE COURT BELOW AND BY THE RESPONDENT DOES VIOLENCE TO FUNDAMENTAL RULES OF STATUTORY CONSTRUCTION.

To give these sections the meaning and effect attributed to them by the Court below and urged by the respondent, there must be read into the sections words which are not there, and words which appear therein must be ignored or even eliminated. For example:

The words *"collected"* and *"collection"* must be imported into both sections.

Section 611 must be enlarged by adding at the end some such clause as the following:

> *"and shall not be credited or refunded or recovered by suit against any Collector or the United States of America."*

There must or should be stricken from section 611 the following clauses, viz.:

> (1) *"and if the collection of any part thereof was stayed"*; and—
>
> (2) *"under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."*

It is submitted that *all* of these insertions and deletions are necessary to make the sections express with adequate clearness and without unnecessary or meaningless words what the respondent claims they mean. But to adopt a construction which requires such adding to and subtracting from the actual legislation does violence to established and fundamental rules governing the construction of statutes.

These sections are parts of a tax statute, and are to be construed liberally in favor of the taxpayer.

Gould v. *Gould*, 245 U.S. 151 (62 L. Ed. 211).

In that case this Court said, at page 163:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

Again in the case of—

Bowers v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (71 L. Ed. 676)—

this Court said, at page 350:

> ". . . The provision is part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers."

Citing—

Eidman v. *Martinez*, 184 U.S. 578, 583 (46 L. Ed. 697, 701).

Schwab v. *Doyle*, 258 U.S. 529, 536 (66 L. Ed. 747, 753).

Whether the respondent's contentions rest upon an alleged withdrawal of its consent to be sued or upon an implied partial repeal of Revised Statutes, sec. 3226, or upon an implied ratification of illegal collections, in any case words not appearing in the text of the statute must be imported and read into it by construction, and words appearing in it must be ignored or deleted to bring about the result urged by the respondent. Section 607 is so clearly remedial in its meaning and effect that no serious contention appears to be made that its provisions in any way contribute to bring about the destruction of pre-existing rights of action. This destructive effect appears to be assigned exclusively to section 611.

The Court below (R. 31, 32), as well as all of the Courts which have upheld the contentions of the respondent, placed special reliance upon certain remarks made by members of Congress during the debates upon the Revenue Act of 1928.

It is the contention of the petitioner that there is no warrant or need to consult the Congressional Record for assistance in the construction of these two sections. They are not obscure or ambiguous or in conflict with other enactments. If they are read as part of the general scheme of tax legislation, and proper weight is given to the true meaning of the word *"overpayment,"* as used throughout the Revenue Acts, and if they are viewed in their proper relationship to sections 3220 and 3226 of the Revised Statutes and to sections 321 and 322 of the Act of 1928, there is no need or justification for reference to legislative proceedings as aids to construction. It is only in cases of obscurity, ambiguity, or doubt that such reference is justified.

Aldridge v. *Williams*, 3 How. 9 (11 L. Ed. 469).
Merritt v. *Welsh*, 104 U.S. 694 (26 L. Ed. 896).
United States v. *Trans-Missouri Freight Assn.*, 166 U.S. 290 (41 L. Ed. 1007).

Mackenzie v. *Hare,* 239 U.S. 299, 308 (60 L. Ed. 297).

United States v. *United Shoe Machinery Co.,* (1916) 234 Fed. 127.

United States v. *Gordin,* 287 Fed. 565, 572.

Auk Bay Salmon Co. v. *United States,* 300 Fed. 907.

Whatever may have been said by members of Congress during the debates, the rights of the petitioner must be determined solely by what was expressed in the bill as finally enacted.

Furthermore, to construe these sections as applicable to involuntary payments if made before their enactment, but as applicable only to voluntary payments if made thereafter (as pointed out above must be the case), would give them the effect of retroactively changing the status of taxpayers whose rights had already been fixed by earlier laws and decisions, although no such purpose or intent is expressly spelled out in the text of the sections as enacted. Such a construction would violate the accepted rule of construction stated by this Court in the case of—

United States v. *Magnolia Petroleum Co.,* 276 U.S. 160, 162 (72 L. Ed. 509, 511)—

in the following language:

> ". . . statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

This case, and the above quotation from it, was recently approved by this Court in the case of—

Russell et al. v. *United States,* 278 U.S. 181 (73 L. Ed. 255).

Following the above quotation the Court, in the Russell case, referring to an alleged retroactive effect of the Revenue Act of 1924, sec. 278, said:

> ". . . No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in Sec. 276 or otherwhere."

So, in the case at bar, no plain purpose to take away an existing right of action against the Government can be spelled out of sections 607 and 611 of the Act of 1928. On the contrary, certain of the circumstances accompanying the enactment of these two sections give positive indication that there was no intent to take away any existing rights or deprive the Courts of jurisdiction over certain classes of illegal seizure cases. Section 612 of the Act of 1928 repealed section 1106 (*a*) of the Act of 1926 and section 606 of the Act of 1928 repealed section 1106 (*b*) of the Act of 1926. This section of the Act of 1926 contained clear and explicit language to prohibit refunds or credits and to bar suits in specified cases. The section was before the same legislative draftsmen who framed sections 606 to 613, inclusive, of the Act of 1928. These draftsmen must be presumed to have known that the Courts had already decided that even the explicit prohibition against credit or refund contained in section 1106 (*a*) of the Act of 1926 did not in any way affect the right of action in the Courts of a victim of an illegal collection.

> *Ellay Co.* v. *Bowers,* 25 Fed. (2d) 637 (C.C.A. 2d Cir., April 9, 1928); certiorari denied (June 4, 1928), 277 U.S. 606 (72 L. Ed. 1012).

It seems reasonable, therefore, if not obvious, that if Congress had meant to make section 611 perform the function of cutting off rights of action in the Courts, it would

have used language even more explicit than that used in section 1106 (*a*) of the Act of 1926, which had already been judicially construed as not having that effect, in spite of its direct and positive language.

Point E.

THE EFFECT GIVEN TO SECTIONS 607 AND 611 OF THE ACT OF 1928 BY THE DISTRICT COURT VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION.

It was ruled by the Court below, and is conceded by the respondent, that the seizure of the petitioner's property in the case at bar constituted an illegal collection.

An illegal collection is no collection at all so far as affecting the open accounts between the taxpayer and the Government, and can have only the effect of setting up a separate and recoverable credit in favor of the taxpayer, which credit the Government cannot apply to other outstanding claims. This proposition is recognized in the provisions of section 284 of the Revenue Act of 1926 and section 322 of the Act of 1928. These sections deal with "Credits and Refunds." They provide in effect that, if a taxpayer's account with the Government is before the Board of Tax Appeals, the Board shall have complete jurisdiction with respect to all open debits and credits (or, as they are termed in the act, "deficiencies" and "overpayments"), except that there is expressly reserved to the taxpayer the right to proceed in the Courts against the Government for the recovery of any collection made after the applicable statute of limitations has expired. In effect, therefore, these sections of the Acts of 1926 and 1928 recognize the fact that such collections (made after the expiration of the period of limitation) cannot be used by the Government as offsets against pending tax deficiencies.

Assuming for the moment that the expiration of the period of limitation did not of itself extinguish all liability for the tax (but only barred the remedy), then the situation immediately following the illegal seizure was as follows:

1. The taxpayer owed the Government the amount of the tax, but the Government's right to enforce collection had expired; that is to say, the liability remained, but the remedy for the satisfaction thereof was lost.

2. The Government owed the petitioner the amount taken from it by seizure, because the seizure was illegal.

Thereupon, section 1106 (*a*) of the Revenue Act of 1926 was enacted, reading as follows:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability, but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

It is submitted that the enactment of this section extinguished the charge against the taxpayer on the Government's books, but left the credit in favor of the petitioner which had resulted from the illegal seizure of its property. The provision in section 1106 (*a*), that the Commissioner should grant no refunds unless the taxpayer had overpaid the tax, did not apply to cases of illegal collections or affect the right of a victim of an illegal collection to recover by suit in the Courts.

Ellay Co. v. *Bowers,* 25 Fed. (2d) 637; certiorari denied, 277 U.S. 606 (72 L. Ed. 1012).

This proposition is further supported by the fact that this Court, in the cases cited as *Bowers* v. *New York & Albany Lighterage Co.*, decided that a victim of an illegal seizure, made under the guise of collecting a tax after it had become barred by the running of the statute of limitations, could recover by a suit at law, even though he had not *overpaid* the tax, *i.e.*, paid more than the amount determined to be the correct amount of the tax. These cases were decided in February, 1927, when section 1106 (*a*) of the Act of 1926 was in full force and effect.

Therefore, even after the passage of section 1106 (*a*) of the Act of 1926, the petitioner had a recoverable net credit on the books of the Government to the extent of the amount of the illegal seizure of its property.

Now the respondent claims that section 611 operates to cut off or extinguish the right of action to recover the property thus illegally held by the Government. This is but another way of saying that section 611 operates to appropriate or confiscate the credit in the petitioner's favor on the books of the Government. This section does not purport to be a statute of limitations applicable to all claims arising by reason of illegal collections. On the contrary, it arbitrarily singles out and bars only those taxpayers who had filed claims in abatement. In other words, it makes an arbitrary distinction between those who did and those who did not contest the assessment and collection of the tax. If a taxpayer paid the tax after it became barred, and never contested it, he can recover the amount of the payment under section 607. If he contested the tax, using the method prescribed by the statutes and regulations (the filing of a claim in abatement), and then became the victim of an illegal seizure of his property, he has no right of action, and the Government appropriates or confiscates his property. It should be emphasized that the distinction made between those who may or may not recover for illegal seizures is not in any way based upon the circumstances under which the

right of action accrued or the character or time of the transaction which constituted the illegal seizure, but is based upon an arbitrary distinction as to what the taxpayer did or did not do before the right of action accrued to him and also upon what prompted the collector to delay collection.

It is submitted that a statute which attempts to affect such an arbitrary classification of rights violates the Fifth Amendment to the Constitution, and, furthermore, that a statute which arbitrarily denies the right to recover property taken without due process of law is itself a denial of due process.

This point is brought into bold relief when it is considered that the illegal act in the case at bar consisted of a seizure under executive mandate which could not be enjoined because of the provisions of Revised Statutes, section 3224.

Graham v. *Dupont*, 262 U.S. 234.

If the expiration of the period of limitation itself extinguished the petitioner's liability for the tax, the result is the same. This point is so fully covered in the briefs of other counsel in cases to be argued with the petitioner's case that it will not be developed here.

Point F.

THE AMOUNT SEIZED UNDER THE WARRANT OF DISTRAINT, WHICH THE COLLECTOR CLAIMED WAS INTEREST, DOES NOT COME WITHIN THE PROVISIONS OF SECTION 611 OF THE REVENUE ACT OF 1928, SINCE IT WAS NOT ASSESSED PRIOR TO JUNE 2, 1924, AND WAS NOT THE SUBJECT OF A CLAIM IN ABATEMENT.

Irrespective of the contentions of the respondent in regard to the meaning and application of section 611, it is

submitted that this section can have no effect on the alleged item of interest, amounting to $62,040.08, which was included in the amount seized by the Collector, because the record discloses no assessment of this item of interest prior to June 2, 1924 (see Assessment Card, Rec. 20-21), or at any other time. It is to be noted that section 611 expressly applies only if the "internal revenue tax (or any interest, penalty, additional amount or addition to such tax) was within the period of limitation properly applicable thereto assessed prior to June 2, 1924."

It is significant that this section makes an explicit differentiation between the *tax* and any *interest* or *penalty*, thus indicating that, any interest or penalty is not to be regarded as a mere incident of the tax or the initial assessment thereof, but must be the subject of a separate assessment by the Commissioner if it is to be affected by the provisions of section 611. Furthermore, section 611, by its express terms, can apply only to "such part" as was the subject of the claim in abatement. The petitioner's claim in abatement applied only to the unpaid balance of the tax itself as assessed, viz., the sum of $171,223.81 (R. 23, 24).

It is submitted, therefore, that since there was no assessment of the interest seized by the Collector in the amount of $62,040.08, and said amount was never the subject of a claim in abatement, the petitioner must be entitled to recover this amount, regardless of whether the filing of a claim in abatement or the Collector's delay in enforcing collection deprived the petitioner of its right of action to recover the tax itself.

CONCLUSION.

If the construction adopted by the Court below and urged by the respondent is to be adopted, the enactment of sections 607 and 611 has brought about the following results:

(1) If a taxpayer has an assessment made against him

and makes no contest respecting it and finally pays it after the statute has run, without duress, he may recover it back, because of the provisions of section 607.

(2) If, on the other hand, a taxpayer, against whom an assessment has been made, took every means to contest his liability and to that end used the very means prescribed by the statutes and regulations, prior to the enactment of the Revenue Act of 1924 (viz., the filing of a claim in abatement), and if he consistently maintained an attitude of protest and denial of liability until the Collector, acting under executive authority, actually seized his property under a warrant of distraint after the statutory period of limitation had expired, he has no rights, no remedies, and no relief.

Such are the inevitable consequences of an adoption of the respondent's contentions.

On the other hand, to adopt the petitioner's contention, a taxpayer, who has paid his tax after the expiration of the statute, can recover by the grace of section 607, unless he had filed a claim in abatement and had done something to tie the hands of the Collector, so that the latter was *prevented* from collecting up to the time the statute of limitations expired; and in that case, having himself interfered with the collection of the tax, he cannot take advantage of the new and liberal provisions of section 607. But, in any event, if he did not voluntarily pay the tax, but maintained his attitude of denial of liability until his property was illegally seized, then he may recover because of the illegality of the proceedings by which he was deprived of his property. The adoption of this view of the meaning and effect of these sections does no violence to any of the accepted rules of statutory construction; it imposes no strain upon the wording of the statute; it involves no question of constitutionality, and it effects a practical result.

It is submitted that these considerations demand that the decree of the United States District Court for the District of Massachusetts be reversed, and that an order be entered in this Court directing judgment for the petitioner.

Respectfully submitted,

HARRIS H. GILMAN,

Attorney for Petitioner.

ROBERT E. GOODWIN,

Of Counsel.

APPENDIX.

Revenue Act of 1921.

Part IV—Administrative Provisions.

Payment of Taxes.

Sec. 250 (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference, to the extent not covered by any credits due to the taxpayer under section 252 (hereinafter called "deficiency"), together with interest thereon at the rate of one-half of 1 per centum per month from the time the tax was due (or, if paid on the installment basis, on the deficiency of each installment from the time the installment was due), shall be paid upon notice and demand by the collector. If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of 1 per centum per month on the amount of such deficiency in the tax from the time it was due (or, if paid on the installment basis, on the amount of the deficiency in each installment from the time the installment was due), which penalty and interest shall become due and payable upon notice and

demand by the collector. If any part of the deficiency is due to fraud with intent to evade tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns willfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the total amount of the deficiency in the tax. In such case the whole amount of the tax unpaid, including the penalty so added, shall become due and payable upon notice and demand by the collector.

REVENUE ACT OF 1921.

Part IV—Administrative Provisions.

Payment of Taxes.

Sec. 250 (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act; . . .

REVENUE ACT OF 1926.

Title XI—General Administrative Provisions.

Final Determinations and Assessments.

Sec. 1106 (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

REVENUE ACT OF 1928.

Subtitle C—Supplemental Provisions.

Supplement O—Overpayments.

Section 321. Overpayment of Installment.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.

REVENUE ACT OF 1928.

Subtitle C—Supplemental Provisions.

Supplement O—Overpayments.

Section 322. Refunds and Credits.

(*a*) Authorization.—Where there has been an overpayment of any tax imposed by this title, the amount of such

overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(*b*) Limitation on allowance.—

(1) Period of limitation.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) Limit on amount of credit or refund.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

(*c*) Effect of petition to Board.—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(*d*) Overpayment found by Board.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

(*e*) Tax withheld at source.—For refund of credit in case of excessive withholding at the source, see section 144 (f).

REVENUE ACT OF 1928.

Title IV—Administrative Provisions.

Section 612. Repeal of Section 1106 (a) of 1926 Act.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

REG. 62, ARTICLE 1032.

"Art. 1032. *Claims for abatement of taxes erroneously assessed*—Claims for abatement of taxes illegally or erroneously assessed shall be made on Form 843. They must be sustained by the affidavits of the parties against whom the taxes were assessed or of other parties cognizant of the facts. When a tax has been assessed and turned over to the collector, the presumption is that the assessment is correct. The burden of proof in rebutting the presumption and showing that it was improperly or illegally assessed, or that relief should be given under a remedial statute, rests upon the applicant for abatement. The affidavits must therefore contain full and explicit statements of all the material facts

relating to the claim in support of which they are offered and to the proper consideration of which they are essential. The legality of the claim is to be determined by the Commissioner upon the facts presented to him. The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund. Claims for abatement may not be filed where the taxpayer has had the benefit of the provisions of section 250 (d). See Article 1006. A collector may himself present once a month a blanket claim on Form 843 for the abatement of taxes coming within certain classes of taxes erroneously assessed."